

ELECTRONICS SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT
AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

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ADVISING YOUR CLIENTS ON INTERNET ISSUES: WHAT YOU DON'T KNOW CAN HURT
YOU

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AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

I. An overview:

- A. UETA became effective in California on January 1, 2000
- B. Electronic Signatures in Global and National Commerce Act (E-sign) will become effective on October 1, 2000
- C. Both enable e-commerce, as opposed to prescribing limiting regimes
- D. For many industries, e-commerce is very important
 - 1. Contract formation
 - a. speed
 - b. retention
 - 2. Disclosures, Notices, Statements, Retention
 - a. speed
 - b. utility to recipient
 - c. access by recipient
 - d. some cost savings
 - i. Can be enormous in sectors where periodic communication is mandated by law
 - ii. Some companies are aggressively seeking conversions

II. Relationship of UETA to E-sign:

- A. UETA drafting was rushed; its goals were:
 - 1. Encourage e-commerce (see Market Opportunity, p. 7)
 - 2. Fend off bad legislation - make uniform
- B. Approval by NCCUSL - end of July, 1999
- C. S 820, California's version of the UETA was passed by the legislature on September 9, 1999 and signed by the Governor on September 16, 1999

III. In 1999, Congress had several bills pending

- A. The primary focus was on:
 - 1. S 761 introduced on March 25, 1999
 - 2. HR 1714 introduced on May 6, 1999
 - 3. Very different bills
- B. Slow movement; viewed as transitional legislation until September 16, 1999
- C. Big shift in Congressional attitude - protect uniformity and substance, avoid political pressure from states - major incursion into sphere of states- but note the UCC in 1950's
- D. With the President threatening a veto
 - 1. November 9, 1999 - HR 1714 passed the House by 356-66,
 - 2. November 19, 1999 - S 761 passed the Senate by a unanimous written consent
 - 3. Very different bills
- E. E-sign (S 761) is the House Bill with the Senate number
 - 1. June 14, passed the House 426-4
 - 2. June 16, passed the Senate 87-0

IV. Coverage:

- A. With Federal E-sign, arguably don't need state legislation
- B. Why "arguably" - see §101(a) - covers only a "transaction in or affecting interstate or foreign commerce"
- C. However, even if a uniform UETA were adopted nationwide, we would need S 761 for "transactions" controlled by Federal requirements.

V. Core principles:

- A. §101(a)(1), (2) - the base rule - legal equivalency of the electronic versions of paper documents and written signatures with the paper versions. The rest of statute consists of prerequisites, exclusions, preemption rules, and exceptions
 - 1. §101(a)(1) covers notices, disclosures, required statements, retention
 - 2. §101(a)(2) covers contract formation
- B. Important definitions
 - 1. §106(5) -- electronic signature
 - 2. §106(9) -- record
 - 3. §106(4) -- electronic record
- C. What it is not
 - 1. It is not "digital signature" legislation
 - a. Much broader - e.g. voice/fax/cable
 - b. Even in Internet world, digital signature can have two meanings:
 - i. Sent digitally -- e.g., simple name on e-mail
 - ii. hash creation, produced by PKI technology to ensure message integrity
 - 2. It is not "digital certificate" legislation.
 - a. E-sign creates an equivalency rule for electronic messages
 - b. Digital certificates are attached to electronic messages and are a statement by a third party of the identity of the sender of the electronic message. Cf. A notary function.
 - 3. E-sign contains no strong attribution (non-repudiation) principle.
- D. For an electronic message to have a high degree of integrity, confidentiality and assurance re identity of the sender, one may use separate services:
 - 1. encryption of message for confidentiality
 - 2. digital signature for message integrity
 - 3. digital certificate for identifying the source or author of message
- E. §101(c) -- consumer protection features

1. Does not appear to cover contract formation, but only "information" (notices, disclosures). Note the fears of consumer advocates.
2. §101(c)(3) -- emphasizes that failure of consent won't affect enforceability of a contract.

VI. Preemption Principles

- A. Note the preemption principles are not, in fact, articulated, except for the concept of consistency.
- B. The Act sets principles re "Exemption to Preemption."
- C. §102(a)(1) -- a special rule for a truly uniform UETA
 1. UETA may have provisions inconsistent with E-sign and yet may "modify, limit or supersede" provisions of E-sign
 2. Treatment of exclusions specifically permitted by UETA
- D. §102(a)(2) -- rules for all other state laws, including non-uniform versions of UETA
 1. State provisions must be "consistent"
 2. Must not favor specific technologies
 3. If enacted, post-June 30, 2000, must refer to the E-sign Act
 4. Major interpretative differences in how §102 should be applied

VII. Prerequisites to use of E-sign

- A. None for business parties (cf. §101(b)(2)); but see Cal. Civ. Code § 1633.5
- B. None explicitly for consumers as a prerequisite to contract formation
- C. In contrast, a detailed regime of disclosures, prerequisites and consent exists before electronic disclosures and records may be substituted for paper disclosures for consumers - §101(c)(1).
 1. Does not affect requirements other than the media -- §101(c)(2)(A); §101(f)
 2. Prior consent is specifically recognized. Does it require a specific permissive rule of law or is absence of a rule sufficient? See §101(c)(5)
- D. Note the Congressional concern re the wisdom of the consumer consent provisions
 1. § 104(d)(1) -- delegation of authority to federal regulatory agencies (not state agencies or self-regulatory organizations) to nullify selectively the consumer disclosures provisions.

2. By June 30, 2001, the FTC and the Secretary of Commerce are to report to Congress with an evaluation of § 101(c)(i)(C)(ii)

VIII. Retention of Records

- A. §§101(d), (e) -- requires accuracy and accessibility
- B. General rule specifically confirmed for checks -- §101(d)(4)
- C. Equivalency protection fails if §101(d)(1) requirements are not met

IX. Notarization v. digital certificates -- major policy debates, but they are avoided by E-sign (§101(g)) and UETA (Cal. § 1633.11).

X. Insurance industry -- me too -- §101(i)

XI. Specific Exceptions -- §103

- A. Picked up from UETA -- §103(a)
- B. Court filings and health and safety issues -- §103(b)

XII. Applicability to Federal and State Governments and Self Regulatory Organizations

- A. Re filings -- major flexibility including the ability to continue to require paper filings -- §104(a) (note absence of limitation provided by §104(c)(1)).
- B. Re Existing Rulemaking Authority -- §104(b)

1. §104(b)(1) seems to permit broad continued interpretative authority
2. But, §104(b)(2) is very limiting. It requires an agency to
 - a. Be consistent with §101
 - b. Impose no additional requirements
 - c. Articulate regulatory findings
 - d. Favor no specific technology
3. Requiring the private sector to retain paper records is prohibited, with limited exceptions. §104(b)(3)(B)

XIII. Transferable Records

- A. A very broad concept under the "standard" version of UETA, which would permit electronic versions of notes and documents of title.
- B. The Transferable Records provisions do not appear in the Calif. UETA

- C. The Transferable Records provisions in E-sign cover only notes secured by real property. § 201